

FCC MAIL SECTION

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 Pre the
 Federal Communications Commission
 Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 92-10

In the Matter of

Amendment of Section 73.202(b) RM-7865
 Table of Allotments,
 FM Broadcast Stations.
 (Sanibel and San Carlos Park, Florida)

REPORT AND ORDER
Proceeding Terminated)

Adopted: June 21, 1995;

Released: June 29, 1995

By the Chief, Allocations Branch:

1. At the request of Ruth Communications Corporation ("Ruth"), permittee of Station WRWX(FM), Channel 253A, Sanibel, Florida, the Commission has before it for consideration the *Notice of Proposed Rule Making* ("Notice"), 7 FCC Rcd 850 (1992), proposing the reallocation of Channel 253A from Sanibel to San Carlos Park, Florida, as that community's first local transmission service. Ruth also requested the modification of its construction permit to specify San Carlos Park as its community of license. Ruth and Sunshine Broadcasting, Inc. ("Sunshine"), licensee of Station WSUV, Channel 292A, Fort Myers Villas, Florida, filed comments. Ruth filed reply comments.

2. The *Notice* stated that the reallocation of Channel 253A to San Carlos Park would provide that community with its first local transmission service, whereas it is currently impossible to provide transmission service at Sanibel. Ruth noted that it has been attempting to construct and operate Station WRWX(FM) at Sanibel since September 1988. However, various federal, state and local authorities have objected to petitioner's proposed transmitter site. The site Ruth originally specified in a 1983 application (File No. BPH-830217A1) for the Sanibel allotment has been declared as environmentally sensitive wetlands and is no longer available, and the city of Sanibel has purchased surrounding property as a conservation area. Ruth claims that local zoning ordinances prohibit construction of a tower elsewhere on Sanibel Island, and no site is available on nearby Pine Island for construction of a new tower. It also states that operation from an existing micro-

wave tower on Pine Island or the mainland is not possible because of short-spacing or other technical concerns. Ruth notes that it has attempted to use a directional antenna for a site on Pine Island to avoid the short-spacing, but the proposed tower site would be located near a bald eagle's nest, and the Florida Game and Fresh Water Commission rejected that proposal. Ruth states that its attempts to reach a compromise with the state agency were unsuccessful. As a consequence, Ruth has never operated Station WRWX(FM) at Sanibel. Ruth claims that if the channel were reallocated to San Carlos Park, it could operate Station WRWX(FM) from an existing tower.

3. Sunshine in its comments argues that there are transmitter sites available that would provide city-grade coverage to Sanibel. Sunshine submits an aeronautical chart that shows that there are two towers on Pine Island. Although Sunshine states that these towers are too far north to be used by Ruth, it claims that the existence of the towers establishes that there are feasible sites on Pine Island. In addition, Sunshine claims that two pending applications for a vacant allotment at Punta Rassa, Florida, proposes transmitter site locations that would provide a city grade signal over Sanibel. Sunshine claims that if these sites are actually available, then there is no reason to change the community of license for WRWX(FM).¹ Sunshine claims that Ruth can move anywhere on Pine Island south of its formerly proposed site without causing any short-spacing to other facilities. Sunshine argues the fact that Ruth's preferred site was opposed by the Florida Game and Fresh Water Commission does not establish that any site in the area would be opposed or that there are no alternate sites available.

4. Ruth in its reply comments argues that Sunshine's comments do not provide sufficient evidence to support asking the Commission to reverse its initial determination in the *Notice* that removal of the sole local transmission service may be warranted in this instance. Ruth claims that Sunshine has failed to provide any specific evidence of a suitable transmitter site that would serve Sanibel, and this failure undermines its arguments that a transmitter site is available. Ruth argues the fact that applicants in another proceeding have proposed sites on Pine Island provides no factual basis on which to conclude that a site elsewhere on Pine Island would receive local zoning approval for construction of a broadcast tower. Ruth notes that an applicant for a new FM radio broadcast facility only needs reasonable assurance that a proposed transmitter site is available. However, a threshold showing provides no evidence that an applicant will be able to secure necessary zoning or other approval to build a transmitter tower, and the grant of a construction permit is not conditioned upon any showing of local approval.

5. Ruth argues that Sunshine is incorrect in its claim that Ruth may be able to construct a broadcast tower on Pine Island. Ruth contends that it considered three sites on the island. Ruth rejected one potential site because it would not comply with the Commission's spacing require-

¹ Conversely, Sunshine questions the validity of the reasonable assurance of site availability regarding the applications in the Punta Rassa proceeding. According to a staff engineering analysis (Application File No. BPH-880303MQ and BPH-880224MN) would provide 70 dBu city grade coverage to Sanibel, but they are both located on Pine Island, and would be precluded because of environmental restrictions. In addition, Application File No. BPH-880303MH and BPH-880303MG are both located on the mainland of Florida, but neither application provides 70 dBu

city grade coverage to Sanibel. We note that Kight Broadcasting Limited Partnership (BPH-880303MH) has been selected as the permittee for Channel 249A, Punta Rassa, Florida. See *Initial Decision*, 7 FCC Rcd 83 (1992). However, Palm Tree Limited Partnership filed a Petition for Reconsideration claiming that the integration analysis in the decision was arbitrary and capricious, citing *Bechtel v. FCC*, No. 92-1378 (December 12, 1993). Therefore, the construction permit is being held in abeyance pending the ultimate outcome of the Bechtel case.

ments, the owner of the second site rejected Ruth's offer for that site, and the third site was rejected because it was located within a protected zone one mile from an eagle's nest. Ruth states that based on its experience with the local zoning and environmental authorities, local experts on obtaining zoning permits, and its previous efforts to locate an available site, it has determined that no sites are available which would be consistent with environmental guidelines and which would receive the necessary zoning approval. Ruth submits the Southern Eagle Nesting Site Map for the 1989-1990 nesting season, prepared by the Lee County Eagle Technical Advisory Committee ("ETAC"), which shows at least thirteen eagle nesting sites on Pine Island, with six sites located on the southern portion of the island. Each nesting site may include more than one eagle's nest. Because of the large number of nests and the wide area a tower would require, Ruth alleges, a tower would not be permitted. Furthermore, Ruth would have to file multiple requests for additional sites with the Lee County ETAC in order to determine whether an eagle's nest is located within the proximity of the proposed tower. Ruth claims that even if it were to locate a site not presently near an eagle's nesting area, by the time a construction permit is granted, a new eagle's nest could have been built near that site.

6. In response to Sunshine's assertion that the existence of two towers on Pine Island north of Ruth's existing site proves that there are suitable sites for a tower on the southern portion of Pine Island, Ruth submits an engineering statement demonstrating that the existing towers will not place a city-grade signal over Sanibel. Furthermore, one of the towers, a 250 foot high cable television tower located in Sanibel Gardens, already includes several existing microwave antennas and could not support any more antennas. In addition, Ruth states that an FM antenna on a cable tower at a cable headend would cause interference to cable subscribers. Because of these problems, the tower owner will not permit Ruth to construct and operate an FM antenna on its tower. Further Ruth submits information confirming that the local zoning officials for Sanibel Island will not permit construction of a new radio broadcast tower on Sanibel Island.

7. *Background* : Hillebrand Broadcasting, Inc., the predecessor corporation to Ruth, filed the original application for a construction permit for Channel 285A at Sanibel, Florida. Subsequently, Channel 253A was substituted for Channel 285A at Sanibel, Florida. See *MM Docket No. 84-1314*, 50 FR 32706, August 14, 1985. A comparative hearing was held on March 10, 1986, at which time Ruth was granted a construction permit. However, two of the losing applicants appealed. The three parties reached a settlement agreement, which was approved by the Review Board. The Commission granted Ruth's application for a construction permit on September 24, 1986. Public Notice No. 19917, released October 24, 1986, stated that grant of the construction permit would not be final until the outcome of a Commission decision on a pending "Application for Review" filed by Punta Ybel. Punta Ybel's application was dismissed for failure to prosecute, it filed a series of unsuccessful appeals of its dismissal. The Presiding judge, Review Board, and the Commission dismissed Punta Ybel's appeals. See *Hillebrand Broadcasting*, 102 FCC 2d 804 (Rev.

Bd. 1985), *recon. denied*, 102 FCC 2d 809 (Rev. Bd. (1985), *review denied*, 1 FCC Rcd 419 (1986). The court of appeals denied Ybel's petition. A final construction permit was issued in September 1988.

8. The original application filed in 1983 specified a tower site in Sanibel Gardens, which is located on Sanibel Island. Ruth was told by the Planning Commission that Sanibel Gardens was the only location for its proposed tower that was acceptable to local zoning authorities at that time. Between the time Ruth filed its application and Punta Ybel exhausted its appeals in September 1988, Sanibel Gardens was declared an environmentally sensitive wetlands - this eliminated the proposed site. Then, Ruth met with the Sanibel Planning Commission again to seek a special use permit for a tower at an alternative site in Sanibel. Ruth was informed that the State of Florida had required all incorporated city and counties to submit 20 year plans on how they intended to accommodate growth. After the Commission approved the 20 year plans, it was determined that radio broadcast towers and antennas were no longer permitted in any of the city's zoning districts. Thereafter, Ruth considered two sites on Pine Island, which were found to be unacceptable. In June 1989 Ruth met with a real estate agent on Pine Island to explore whether a site on that Island would be acceptable. A site was found that seemed to be acceptable subject to Federal Aviation Administration ("FAA"), Federal Communications Commission ("FCC"), and zoning approval. On August 1, 1989, Ruth was informed that the site would not fully comply with the Commission's spacing requirements. A change in the Commission's Rules permitted Ruth to reconsider its original site on Pine Island by using six kilowatt and a directionalized antenna. See *Amendment of Part 73 of the Rules to Provide For an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations (Second Report and Order)*, 4 FCC Rcd 6375 (1989). On October 2, 1989, Ruth filed an application (BPH-8910021A) for the Pine Island site, specifying six kilowatts with a directional antenna. Ruth received FAA approval on March 1, 1990. In June 1990 an eagles nest was discovered on Pine Island 1300 feet from the proposed tower site. On August 22, 1990, the Florida Game and Fresh Water Commission rejected Ruth's proposed tower site, concluding that the tower posed a threat to the eagles. On March 16, 1991, Ruth filed a petition for rule making requesting that the Commission change the community of license for station WRWX(FM) from Sanibel to San Carlos Park, Florida.

9. Upon review of this proposal, we believe that the reallocation of Channel 253A from Sanibel, Florida, to San Carlos Park, Florida, will result in a preferential allotment based on the above information. We are convinced that Ruth has made every reasonable effort to secure a site at Sanibel and none appears to be available. In addition, the reallocation of Channel 253A from Sanibel (population 5,468) to San Carlos Park (population 11,785) will provide the larger community with a first local transmission service. While it also removes Sanibel's sole local potential service, Sanibel will continue to receive reception service from at least 17 stations.² Moreover, since the station has never been on the air, this change in community will not

² Sanibel presently receives reception service from the following stations: WAYJ(FM), Channel 204C2, WSFP(FM), Channel 211C1, WJYO(FM), Channel 218A, WOLZ(FM), Channel

237C1, WINK(FM), Channel 245C, WHEW(FM), and Channel 270C, Fort Meyers, Florida; WSOR(FM), Channel 215C1, WCVU(FM), and Channel 233C, Naples, Florida; WIKX(FM),

cause any disruption to an existing service. While we consider important the potential service that unbuilt stations represent, we acknowledge that they are not a service on which the public has come to rely on. Therefore, we do not consider their removal from a community to represent the same concerns with loss of service that removal of an operating station would represent. See *Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (1993) and *Glencoe and Le Sueur, Minnesota*, 7 FCC Rcd 7651 (1992).

10. Channel 253A can be allotted to San Carlos Park in compliance with the Commission's minimum distance separation requirements with a site restriction 10.9 kilometers (6.8 miles) west.³ In accordance with Section 1.420(i) of the Commission's Rules, we will modify the construction permit for Station WRWX(FM) to specify San Carlos Park, Florida, as its community of license on Channel 253A.

11. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective August 14, 1995, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Sanibel, Florida	--
San Carlos Park, Florida	253A

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WRWX(FM), IS MODIFIED, to specify San Carlos Park, Florida, as its community of license on Channel 253A, in lieu of Channel 253A at Sanibel, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ruth Communications Corporation, permittee of Station WRWX(FM), is

required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

Channel 225C2, Punta Gorda, Florida; WRXK(FM), Channel 241C, Bonita Springs, Florida; WJBX(FM), Channel 257C2, Fort Meyers Beach, Florida; WROC(FM), Channel 292A, Fort Myers Villas, Florida; WEEJ(FM), Channel 261C1, Port Charlotte, Florida; WAVV(FM), Channel 266C1, Marco, Florida;

WXKB(FM), Channel 279C2, Cape Coral, Florida; WIXI(FM), Channel 288C3, Naples Park, Florida; and WCKT(FM), Channel 296C2, Lehigh Acres, Florida.

³ The coordinates for Channel 253A at San Carlos Park are North Latitude 26-30-02 and West Longitude 81-54-16.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.